No. 76-858

In the Supreme Court of the United States

OCTOBER TERM, 1976

GOULD, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is not officially reported (see 542 F. 2d 1176). The decision and order of the National Labor Relations Board (Pet. App. A2-A32) are reported at 216 N.L.R.B. 1031.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1976. The petition for a writ of certiorari was filed on December 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's findings that petitioner discharged four employees because of their union activities.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

Petitioner Gould, Inc. (the "Company") manufactures heating elements at a facility in Cookeville, Tennessee (A. 15).[1] By September 1973, the Company employed approximately 70 to 75 persons in its production and maintenance departments in Cookeville (A. 150). At least 52 of these employees had been hired under federally-funded job programs supervised by the Tennessee Industrial Training Service (A. 223). These programs required the Company to hire, train and maintain a work force made up of a high percentage of the "hardcore" unemployed (A. 150-151). In return, the federal government obligated itself to pay one-half of the salary of any employee hired under these programs for the duration of the employee's training (A. 150). To maintain its quota of "hardcore" employees, the Company found it necessary to relax some of its standards for employee conduct—in particular, its rules on tardiness and absenteeism (A. 138-139).

In June 1973, employee James Anderson began discussing union representation with other employees (A. 5, 16, 64). Anderson contacted the Union[2] on August 22, 1973, and arranged a meeting with union representatives at his home on August 26 (A. 16-17, 64). On August 30, Anderson and fellow employee David Mayberry met with union representative C. E. Strickland, signed cards

[1] "A." refers to the parties' printed appendix in the court of appeals. We are lodging a copy of this appendix with this Court.

[2] International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW.

authorizing the Union to act as their bargaining representative and agreed to distribute union literature to fellow employees (A. 17, 64). On September 11, a union organizational meeting was held at employee Patricia Murphy's apartment (A. 6, 17, 38, 46, 64-65, 92, 97, 105). This meeting was attended by employees Anderson, Mayberry, Murphy, Deborah Eller, Brenda Lusk and Billie Hawkins (A. 17, 38, 64-65, 105). At this meeting, Murphy, Eller, Lusk and Hawkins signed union authorization cards and promised to contact other employees to solicit their support for the Union (A. 17, 48, 65, 92-93, 97-98, 105-106). Thereafter, Anderson, Murphy, Lusk and Eller discussed the Union with other employees and actively solicited authorization cards on the Union's behalf (A. 65, 83, 92-93, 97-98, 105-106).

Shortly after James Anderson had begun to talk with fellow employees about the Union, the Company's Director of Personnel, Bobby Farris, asked Anderson whether he had heard any discussion in the plant concerning unionization (A. 5, 18, 64, 70, 78). When Anderson replied that he had heard some discussion of unionization, Farris asked him who was doing the talking (A. 5, 18, 70, 78). Anderson responded, "just employees in general." Farris then requested Anderson to report to him anything that he might overhear that would be of interest (A. 70, 79).

On September 14, three days after the first organizational meeting at Patricia Murphy's apartment, the Company's General Foreman, James Looper, entered Murphy's work area and said, "It's coming in, isn't it?" Murphy asked, "What's coming in?" Looper replied, "You know what I mean" (A. 6, 18, 93-94). On September 18, Looper approached Billie Hawkins at her work station and showed her an article about a plant where Looper had worked that had closed after a lengthy strike. After Hawkins read the article, Looper said that such closings are "what unions

cause." Looper then remarked that the Company knew "90 percent of what was going on in town at night" (A. 6, 18-19, 40-42, 50-54).

On Monday, September 17, near the end of James Anderson's shift, the Company's Superintendent of Manufacturing, Ray Bittner, called Anderson into his office and discharged him, stating, "[Y]ou don't meet our expectations" (A. 6, 20, 71, 206).[3] Bittner gave Anderson his check but, when Anderson asked for his vacation pay and termination slip, Bittner replied that neither was prepared and he would receive them in the mail (A. 20, 71). Anderson then asked Bittner what reason the Company expected to put on his termination slip (A. 6, 20, 71). Bittner stated he did not know (*ibid.*). Subsequently, Anderson received his termination notice, which listed two reasons not previously advanced by Bittner—(1) Anderson's job performance did not meet the Company's standards for machinists and (2) the flexatherm machine operator position Anderson had been hired for initially had not materialized (A. 20, 71, 234). Thereafter, a new trainee was hired to replace Anderson on the flexatherm machine (A. 187).

Anderson continued to solicit employees on behalf of the Union following his discharge (A. 18, 82-83). Shortly after Anderson's discharge, Superintendent of Manufacturing Bittner told employee David Mayberry to tell Anderson "to lay off what he was doing if he wanted to get a job in this town" because "Bill Leggitt[4] has a lot of friends" (A. 18, 82-83).

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[3]Anderson was hired in August 1972, as a flexatherm machine operator trainee at $2.25 per hour. He was given a raise to $2.50 per hour in June 1973, and received a third raise in July 1973 (A. 153). Anderson received compliments on his work and was never given a written warning (A. 21).

[4]Plant Manager Leggitt was the senior management official at the plant (A. 16).

Murphy, Lusk and Eller—all of whom had been hired through the federal jobs program to work in the Company's production department—were also discharged on September 17, 1973 (A. 21, 91, 97, 105). Each had received compliments from management concerning her work (A. 95, 103, 109-110, 131-132); none had ever been suspended or given a written warning, although all three had received counseling because of absenteeism, tardiness and leaving their work station (A. 22, 102, 109, 139-140, 211). The last counseling session took place in the Company's personnel office during the third week in August 1973 (A. 102, 108-109). At this meeting, Looper and Farris had talked with Eller and Lusk about their absenteeism and tardiness (A. 102, 108-109). But Looper had told Eller and Lusk at that meeting that they should not feel threatened by the meeting because matters had not reached the point where they would be discharged if they were tardy or absent one more time (A. 102, 108-109, 141). Thereafter, and until their sudden discharges four weeks later, each of the women's attendance records showed a marked improvement (A. 7, 22, 102-103, 109, 141, 151).

On Monday, September 17, at 8:00 in the morning, Looper went to Patricia Murphy's work station and told her to get her belongings, to be very quiet, and to come with him (A. 22, 94). He then led Murphy to the door, clocked her out, and told her that she had been terminated because of her attitude and conduct (*ibid.*). At about the same time, Looper, in similar fashion, terminated Brenda Lusk, telling her that she was being discharged because of her excessive absenteeism and tardiness (A. 22, 100). Deborah Eller, who was absent that day, came in the next morning and found her time card missing (A. 22, 107-108, 214). She went to her work station to get her personal belongings and then went to the cafeteria to wait for Looper. When Looper arrived, he told her that she had been terminated because of her absentee record (A. 107-108). As in Anderson's case, the Company had not prepared the official termination slips at the time of the discharges (A. 6, 21-22, 95, 101).

In finding that Anderson, Murphy, Lusk and Eller were discharged because of their union activities, the Board rejected the Company's contention that it had been unaware of the employees' union activities. The Board relied upon Personnel Director Farris's interrogation of Anderson concerning union activity in the plant, General Foreman Looper's conversation with Murphy concerning unionization, and Looper's remark to Billie Hawkins that the Company was aware of what was going on at night (Pet. App. A3-A4). The Board also noted (*id.* at A4-A5):

> In addition, the conclusion that [the Company] was aware of the union activities of the above-named individuals and was motivated to discharge them because of these activities is inescapable from the circumstances surrounding the discharges themselves: (1) 6 days after the employees met at Murphy's house to discuss the Union and sign authorization cards, and the Monday following Looper's late Friday afternoon inquiry of Murphy as to whether the Union was coming in, to which she gave an affirmative response, [the Company] chose to discharge four of the six employees in attendance at the union meeting at Murphy's house; (2) although the Administrative Law Judge found that [the Company] had a practice of discharging employees on Friday, these four individuals were all discharged on a Monday; (3) the termination slips had not been completed for any of the discharged employees at the time they were notified they were discharged, and Superintendent of Manufacturing Bittner told Anderson that he did not know what the reason for dismissal would be on that employee's termination slip when it was completed and mailed to him; and (4) Murphy and Lusk were led away from their work stations in an atmosphere of secrecy to be told they were going to be discharged, and Eller was told of her termination after being clocked out.

> Nor is the unusual procedure [the Company] followed in discharging the employees here explained by the seriousness of, or proximity to, the reasons asserted for their discharges. In every case, the reasons given had accumulated over a long period of time and in no instance had there been any serious recent derelictions on the part of the discharged individuals to incur the [Company's] further displeasure with their work habits or conduct. In fact, although [the Company] allegedly discharged Murphy, Lusk, and Eller because of excessive absenteeism and tardiness, all three had improved upon their absentee records just prior to their discharges. And although Anderson purportedly was discharged for poor job performance and lack of work, he was never given any warning about his work performance and had in fact been complimented about his work by several of the supervisors, and after his discharge a new individual was hired by [the Company] to fill his job classification. In these circumstances, we conclude, as did the Administrative Law Judge, that the reasons advanced by [the Company] to explain the discharges are not credible and are pretextual in nature.

The Board therefore ordered the Company, *inter alia*, to offer to reinstate the four employees and to compensate them for any loss in pay (Pet. App. A6-A7).[5] The court of appeals enforced the pertinent provisions of the Board's order (Pet. App. A1-A2).[6]

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[5]The Board also found that the Company had committed several additional unfair labor practices, and it included in its order provisions designed to deal with those practices (Pet. App. A6-A7; A. 28-30).

[6]The court declined to enforce that portion of the Board's order pertaining to the Board's finding that the Company had violated Section 8(a)(1) of the Act by "telling employees it could get them any benefits that the Union could" (Pet. App. A1-A2; footnote omitted).

ARGUMENT

The sole question presented is whether there is substantial evidence in the record as a whole to support the Board's findings that the four employees were discharged because of their union activities. That question does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491.

In any event, the evidence discussed above and in the decisions of the Board (Pet. App. A3-A5) and the Administrative Law Judge (Pet. App. A13-A20) amply support the Board's findings. Contrary to petitioner's suggestion (Pet. 10), the Board did not "base its findings solely upon the uncorroborated testimony of" the four discharged employees. The Board relied on statements of Company officials indicating their knowledge of union activity,[7] the timing of the discharges, and the failure of the Company's assigned reasons for the discharges to withstand scrutiny.

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[7]The Company complains that its own interested witnesses should have been credited because they passed a lie detector test. The Administrative Law Judge properly discounted this evidence, explaining (Pet. App. A24): "[The Company's] use of the lie detector is interesting, but due to the type questions used and polygraphs' general unreliability, I find it had little weight in the total evidence, and its conclusionary results are not adopted."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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